

THE HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,
Plaintiff,

vs.

MOTOROLA, INC., et al.,
Defendants.

MOTOROLA MOBILITY, INC., et al.,
Plaintiffs,

vs.

MICROSOFT CORPORATION,
Defendants.

Case No. C10-1823-JLR

**MICROSOFT'S RESPONSE TO
MOTOROLA'S MOTION TO FILE
DOCUMENTS UNDER SEAL IN
SUPPORT OF ITS *DAUBERT*
MOTION (ECF NO. 390)**

NOTED: September 7, 2012

I. INTRODUCTION

Microsoft does not oppose Motorola Mobility and General Instrument's August 27, 2012 Motion to File Documents Under Seal in Support of the Daubert Motion to Exclude Certain Testimony of Plaintiff's Experts Drs. Lynde, Murphy, and Simcoe (Motorola's "Motion") (ECF No. 390). As described in Motorola's Motion, the following documents were filed under seal:

MICROSOFT'S RESPONSE TO MOTOROLA'S
8-27-12 MOTION TO SEAL (ECF NO. 390) - 1

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1. Motorola Mobility's and General Instrument's *Daubert* Motion to Exclude Certain Testimony of Plaintiff's Experts Dr.s. Lynde, Murphy, and Simcoe (ECF Nos. 391 & 393); and
2. Exhibits 3-8, 10, 21 and 33 to the Declaration of Samuel L. Brenner in Support thereof.

Motorola argues that Exhibits 8, 10, 21, and 33 contain Confidential Business Information relating to the parties' private licensing and business practices, the disclosure of which could lead to competitive harm. Microsoft agrees that these documents should remain under seal. Likewise, Microsoft agrees that an unredacted version of Motorola's *Daubert* Motion should remain under seal.

Exhibits 3-7 contain excerpts from certain of Microsoft's experts' opening and rebuttal reports. Motorola states that it does not believe any of the excerpts contain Confidential Business Information and none need remain under seal. Microsoft agrees that Exhibits 3-4 and Exhibits 6-7 need not remain under seal.¹ However, Exhibit 5 contains references to documents produced by non-parties pursuant to subpoenas issued in this Action that were designated as Attorneys' Eyes Only under the Protective Order. Good cause exists to maintain Exhibit 5 under seal.

II. AUTHORITY

A. The Operative Protective Order and Applicable Court Rules Permit and Require Microsoft to File Confidential Information under Seal.

Pursuant to the Protective Order issued by the Court on July 21, 2011, the parties are required to file materials designated by the parties or non-parties as containing Confidential

¹ Microsoft is not withdrawing its designation of the expert reports from which Exhibits 3-7 originate as containing Confidential Business Information. While the specific excerpts submitted by Motorola may not contain Confidential Business Information, other portions of these reports do contain Confidential Business Information and are subject to the filing requirements set forth in the Protective Order.

1 Business Information² under seal, with such documents to remain under seal upon Court
 2 approval. Paragraphs 2(a) and 8 of the Protective Order govern the filing of documents under
 3 seal. Paragraph 2(a) provides:

4 Any information submitted in pre-trial discovery or in a pleading, motion, or
 5 response to a motion in this action, either voluntarily or pursuant to order, and
 6 which is asserted by a supplier to contain or constitute Confidential Business
 7 Information shall be so designated by such supplier in writing...and shall be
 8 segregated from other information being submitted. Documents shall be clearly
 9 and prominently marked on their face with the legend: “[SUPPLIER’S NAME]
 10 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO
 11 PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of
 12 this action, such information, whether submitted in writing or in oral testimony,
 13 shall be disclosed only *in camera* before the Court and shall be filed only under
 14 seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District
 15 Court for the Western District of Washington.

16 Paragraph 8 likewise provides that:

17 Any Confidential Business Information submitted to the Court in connection
 18 with a motion or other proceeding within the purview of this action shall be
 19 submitted under seal pursuant to paragraph 2 above.

20 *Id.*, at ¶ 8.

21 The Federal Rules of Civil Procedure recognize that courts may permit parties to file
 22 “trade secrets or other confidential research, development, or commercial information” under
 23 seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly
 24 competing needs and interests of the parties affected by discovery,” in crafting the appropriate
 25 treatment of documents for which protected treatment is requested. *Seattle Times Co. v.*
Rhinehart, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*,
 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

² “Confidential Business Information” is defined in the parties’ Protective Order as “information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amounts or source of any income, profits, losses, or expenditures.” Protective Order Regarding the Disclosure and Use of Discovery Materials (ECF No. 72), ¶1.

1 Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed in
 2 support of a non-dispositive motion upon a showing of good cause. While the public generally
 3 enjoys a right to inspect and copy public records, “it is uncontested ... that the right to inspect
 4 and copy judicial records is not absolute. Every court has supervisory power over its own
 5 records and files, and access has been denied where court files might have become a vehicle
 6 for improper purposes.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S. Ct.
 7 1306 (1978). As the Court recognized, one such “improper purpose” is where the commercial
 8 business information at issue is sought to be used as a “source[] of business information that
 9 might harm a litigant’s competitive standing.” *Id.* (denying access to copies of tapes played at
 10 trial and noting that courts refused public access to their files where granting such access might
 11 “become a vehicle for improper purposes,” including causing a litigant competitive harm).
 12 Good cause exists to maintain Exhibit 5 under seal.

13 **B. Good Cause Exists for Maintaining Exhibit 5 Under Seal.**

14 Exhibit 5 consists of excerpts from the opening expert report of Matthew R. Lynde, one
 15 of Microsoft’s experts in this Action. The excerpts reference and describe documents
 16 produced by non-parties that have been designated as “Outside Attorneys’ Eyes Only” under
 17 the Protective Order. Just as the parties would be required to file these underlying documents
 18 under seal, so to should documents referencing these underlying materials be maintained under
 19 seal. Good cause exists to maintain Exhibit 5 under seal.

20 **III. CONCLUSION**

21 For these reasons, Microsoft respectfully requests that Exhibit 5 to the Brenner
 22 Declaration, and any references to materials contained in Exhibit 5 in Motorola’s *Daubert*
 23 Motion (ECF Nos. 391 & 393), remain under seal. Microsoft does not oppose the remainder of
 24 Motorola’s motion.
 25

1 Nothing herein is intended as a waiver of Microsoft's right to contest Motorola's
2 designation of material as Confidential in accordance with the terms of the Protective Order.
3 Microsoft expressly reserves the right to do so as the circumstances warrant.

4 DATED this 5th day of September, 2012.

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CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 5th day of September, 2012, I caused the preceding document to be served on counsel of record in the following manner:

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DATED this 5th day of September, 2012.

s/ Linda Bledsoe
LINDA BLEDSOE